Supreme Court, U.S.
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No. 09-1038

In The
Supreme Court of the United States

ARTHUR C. WAGNER, JR., Individually
and for the benefit of Jean Marie Wagner,
Petitioner,

v.

LIVE NATION MOTOR SPORTS, INC., f/k/a SFX MOTOR SPORTS, INC., d/b/a Clear Channel Entertainment-Motor Sports; and Heartland Park Raceway, L.L.C.,
Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Tenth Circuit

BRIEF IN OPPOSITION

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STATEMENT OF PARTIES

Petitioner's Statement of the Parties is incorrect to the extent it states Heartland Park Raceway, LLC was a party to the appeal to the Tenth Circuit or a party to Petitioner's Petition for Writ of Certiorari. At the district court, the jury found Heartland Park Raceway, LLC was not liable for wanton conduct and Heartland Park Raceway, LLC did not appeal the judgment or any issue to the Tenth Circuit. Therefore, Heartland Park Raceway, LLC has not been a party to this action since the district court entered judgment in its favor.

RULE 29.6 DISCLOSURE STATEMENT

Live Nation Motor Sports, Inc., formerly a Texas corporation, was wholly owned by Live Nation, Inc. until it was sold on or about September of 2008 to Feld Entertainment, Inc., and is now known as Feld Motor Sports, Inc., a Delaware corporation, with its principal offices still located in Aurora, IL. Feld Entertainment, Inc. is a privately held company based out of Vienna, Virginia and it wholly owns Feld Motor Sports, Inc.

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STATEMENT OF THE CASE

The procedural posture of the case is as follows. Following discovery, and based on the release and waiver forms Petitioner had signed before the race, the district court granted Respondent and Heartland Park Raceway, LLC summary judgment on Petitioner's negligence claims. The district court granted summary judgment to the other remaining defendants on all of Petitioner's claims, because the record contained no evidence from which a jury might conclude they owed a duty to Petitioner. Petitioner has not appealed the district court's entry of summary judgment on the negligence claim or the other remaining defendants. The case went to trial solely against Respondent and Heartland Park Raceway, LLC, and solely on a theory of wanton conduct under Kansas law.

Respondent moved for judgment as a matter of law at the close of Petitioner's evidence and for judgment notwithstanding the verdict at the close of all evidence, incorporating all of the arguments set forth in its Motion for Summary Judgment in addition to the oral argument presented. The district court denied both motions. After a five-day trial, the jury returned a verdict in favor of Heartland Park Raceway, LLC and against Respondent. The jury awarded roughly $2.6 million in compensatory damages.

Following entry of judgment in accordance with the jury's verdict, Respondent moved under Fed. R. Civ. P. 50(b) for judgment as a matter of law, based on a claim of insufficient evidence to support a jury finding of wanton conduct; under Rule 59(a) for a new trial, based on a variety of grounds not ruled on by the

Tenth Circuit, and under Rule 59(e) for alteration or amendment of the judgment, again, based on grounds not ruled on by the Tenth Circuit. The district court denied the motion for judgment as a matter of law and the motion for new trial, but granted in part the motion to alter or amend the judgment. The Court then ordered entry of an amended judgment that reduced Petitioner's damages by just over a million dollars.

Respondent timely appealed to the Tenth Circuit and filed a motion asking the Tenth Circuit certify to the Kansas Supreme Court questions regarding whether comparative fault principles apply within an action based solely on a claim of wanton conduct. Petitioner filed a cross-appeal to the Tenth Circuit. The Tenth Circuit heard oral argument on Respondent's appeal and Petitioner's cross-appeal.

On November 13, 2009, the Tenth Circuit filed its decision reversing the district court's denial of Respondent's Rule 50(b) motion, vacating the jury's verdict on Petitioner's wanton conduct claim, and remanding to the district court with instructions to enter judgment as a matter of law in favor of Respondent. The Tenth Circuit did not reach the issues raised in regard to the district court's denial of Respondent's motion for new trial under Rule 59(a). Further, the Tenth Circuit dismissed Petitioner's cross-appeal as moot and Respondent's pending motion for certification to the Kansas Supreme Court was also denied as moot. Finally, Petitioner requested a Petition for Rehearing *en banc*, which the Tenth Circuit denied by written order filed on December 7, 2009. On March 1, 2010, Petitioner filed his Petition for Writ of Certiorari.

The facts of the case are as follows. The accident concerned here occurred during a motorcycle race conducted at Heartland Park Topeka in Topeka, Kansas on August 8, 2003. The accident occurred when Mr. Wagner's motorcycle left the track, traveled for approximately 250 feet, and struck a wall outside of Corner 10. Though the wall is protected for hundreds of feet by tires, Mr. Wagner's motorcycle struck the wall at a point at least 20 yards to the left of the tires, well outside of the anticipated impact zone and where no racer had ever made contact with the wall.

During the race at issue, the race officials were as follows. Kevin Elliott was Respondent's Director of Operations regarding road racing. Mr. Elliott raced motorcycles from 1980 until 1989 and has been involved in the motorcycle racing industry for twenty-eight (28) years.

William Ritger was the Safety Director and Race Control on the day of Mr. Wagner's accident. Mr. Ritger started working as a corner worker in 1989 and had ten years of experience working as Race Control and Safety Director for motorcycle races. Mr. Ritger completed a road racing school in approximately 1993.

William Fehrman was the Race Director at the time of the accident at issue. Mr. Fehrman was a law enforcement officer for over twenty-five (25) years. He started working as a Race Director in 1993 and has been a Race Director since that time. He was the Race Director for motorcycle races at Heartland Park Topeka in 1991, 1993, 1999, and 2000. Mr. Fehrman has completed a road racing school, as well as an

advanced road racing school. He participated in road races at Heartland Park Topeka in 1988 and 1989.

Gordon Spieckerman acted as the assistant to Race Control on the day of Mr. Wagner's accident. Race control is someone who monitors the conditions during a race and makes adjustments with respect to changing conditions as necessary. Mr. Spieckerman started working as a corner worker in the mid-1980s and has been acting as the same ever since that time. Mr. Spieckerman has been a member, board member, and safety director of the Midwest Café Racing Association ("MCRA"). Finally, Mr. Spieckerman is involved in the training of corner workers.

Mr. Abbott was a full-time employee of SFX with respect to the motorcycle races at issue. At the time of trial, Mr. Abbott was the manager for Michael Jordan Motor Sports. Prior to Mr. Wagner's accident, Mr. Abbott had participated in pro, semi-pro, and amateur motorcycle races for over ten (10) years and competed at the highest level of motorcycle racing in the United States, AMA Super Bike level. Mr. Abbott has been involved in the motorcycle racing industry for over twenty (20) years.

All of the race officials testified there was plenty of distance, approximately 250 feet, between the track and the wall at issue to be considered safe. No racer or track official had ever expressed concern about the wall at issue. The racers, including Mr. Wagner, were given the opportunity the day before the accident and just prior to the subject race to complete several practice sessions on the track. These practice runs provided the racers with an opportunity to inspect the track and report any areas of concern as they were

required to do pursuant to the release the racers signed prior to the practice sessions and the subject race.

Further, the race officials and six professional racers inspected the track, and all of them felt the wall at Corner 10 was properly protected by a tire wall, which was located in the impact zone and some testified the tire wall extended past industry standards. Heartland Park met the safety standards set by the Federation Internationale De Motocyclisme[1] ("FIM") and Federation Internationale De L' Auto obile[2] ("FIA").

In preparing for the race, race officials placed portions of 27-foot long "air fence," air-filled crash attenuation devices, around the track locations they deemed the most dangerous, the likely "impact" areas, some of which were only 10 to 15 feet off the racetrack in comparison to the approximately 250 feet Petitioner travelled before striking the wall at issue. An air fence was not placed at Corner 10 because it was further back from the track, no rider had previously hit the

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[1] The FIM is the governing body of motorcycle racing, the sanctioning body for 90 national motorcycle federations, and involved in many non-racing activities that promote the sport, its safety, and support relevant public policy. It also makes rules and codes in regards to motorcycle racing. See http://www.fim.ch/en/default.asp

[2] The FIA is a non-profit association, rule making body, and a sanctioning body which brings together 213 national motoring organizations from 125 countries on 5 continents. The FIA makes policies and adjudges violations. They sponsor/sanction several racing organizations/leagues and make rules for these racing leagues as well. See http://www.fia.com/index_800.html.

wall there, and there was sufficient run-off space allowing "a lot of opportunity to get the bike under control." Additionally, that portion of the wall was not considered to be an impact area because it was "so far past the apex of the corner" the adjacent portion of the track was more of a straightaway.

Race officials agreed that you do not put air fence on straightaways. If a motorcycle were out of control, it would most likely occur prior to reaching the apex point. At the apex, a bike is likely to be back under control, but even from the apex the trajectory would still project a rider into the tires. Therefore, the race officials did not expect a rider would hit the wall where Mr. Wagner's motorcycle struck.

There were corner workers located at each turn along the track. The corner worker position required the individual to watch the track, notify the control tower of any problems, and display flags to the racers as necessary. Race officials testified the corner worker position is "not a highly trained or specialized position," but "a very simple position with very simple rules and regulations and very simple operating procedures."

A training session was held every morning prior to the races, where the workers were given a demonstration by two different trainers on how to use their flags and other equipment. The corner workers who worked at Corner 10 testified they were well-trained, their duties were explained to them, and any questions were answered. Each corner worker station was provided with a radio to communicate with the control tower, and an official explained how to use the radio to identify any problems and to get assistance

because of an accident. Each corner worker was also given supplies to assist in picking up debris and given a fire extinguisher. A brochure was also provided to workers as a quick reference guide. In addition, the race officials arranged for two ambulances and a fire suppression truck to be present at the race track.

Mr. Wagner had been racing for 18 years, and has raced at Daytona and Loudon, where he admitted there was a lot of unprotected concrete around those racetracks. Further, plaintiff's own expert witness, Russell Darnell, agreed that other more famous tracks, such as Daytona and Indianapolis 500, had concrete all the way around the corners, those tracks were certified safe, and he approved the use of run-off areas and admitted it is not always possible to eliminate barriers. Along those same lines, race officials testified it was impossible to protect every area of the race track.

Mr. Wagner left the racetrack at Turn 10 where the corner workers at Corner 10, Randy and Linda Bodtke, were stationed. As soon as Mr. Wagner left the track, corner workers called the control tower to inform race officials of the accident and they instructed them to wave the red flag. Further, Mr. Bodtke testified that as soon as Mr. Wagner left the track, he grabbed the fire extinguisher and crossed the race track when it was safe to do so, because he was trying not to put him or other racers in danger as he was trained. Mr. Bodtke got to the site of the accident within less than a minute and could hear the ambulance approaching. A fire suppression truck also arrived, spraying chemical around the site.

The corner worker from Corner 11 got to Mr. Wagner before Mr. Bodtke did and was spraying the area in which Mr. Wagner was located. Mrs. Bodtke eventually arrived on the scene and saw a white substance on Mr. Wagner's back; however, the paramedics came and turned Mr. Wagner over onto his back so no one could see the white substance. Multiple witnesses testified the corner workers performed their jobs well. Petitioner's own expert witness agreed that, based on the corner workers' testimony, they did what they were trained and expected to do.

A life flight helicopter arrived shortly thereafter and took Mr. Wagner to KU Medical Center for additional treatment. Mrs. Bodtke testified that Mr. Bodtke and the corner worker from corner 11 got to Mr. Wagner very quickly and extinguished the fire. In fact, she testified everyone responded very quickly, within a minute, including an ambulance and fire suppression truck.

The safety director for the race at issue, who had worked at Daytona, kept a radio log that reflects the pertinent times involved. The radio log states: at 3:56, a bike and rider were down at Corner 10 and the tower immediately called for a red flag around the track; at 4:17, a helicopter flight was called for and at 4:40, Mr. Wagner arrived at the KU Medical Center in Kansas City. Race officials testified the response to the accident was very fast, especially by the ambulance.

REASONS TO DENY PETITION

The case set forth in Wagner's Petition for Writ of Certiorari is a far cry from the evidence submitted to the jury at trial and the arguments made to the Tenth

Circuit. Petitioner presents three questions to this Court all of which are without merit. Petitioner argues that (1) his Fifth Amendment right to due process was violated, (2) the Tenth Circuit failed to follow Kansas law as required by 28 U.S.C.A. § 1652 in issuing its decision, and (3) his Seventh Amendment right to a jury trial was violated.

The Panel's Decision does not Violate the Fifth Amendment.

Petitioner's argument that the decision of the Tenth Circuit panel of judges that decided this case (the "Panel") violated the Fifth Amendment with respect to due process requirements flies in the face of well-established case law. Petitioner's argument regarding the Fifth Amendment is nothing short of an attempt to create a constitutional issue out of thin air and crosses over well into the realm of frivolous.

Petitioner is attempting to argue the Panel's alleged improper decision has deprived Petitioner of the judgment he was awarded or property without due process despite the fact that the asserted deprivation of property occurred through the appellate process of the federal courts. Petitioner fails to cite any law on point with respect to this argument, because it is completely devoid of any merit and is contrary to the long-standing rule of law on this point.

The federal courts have clearly held that,

> The basic requisites of due process when applied to judicial proceedings are that, having due regard to the form and nature of the proceeding and the character of the rights

> which may be affected, the order, judgment, or decree be entered by a court clothed with jurisdiction of the subject matter and that the party or parties bound by it have notice and be afforded an opportunity to present every available defense. An order, judgment, or decree entered in such circumstances does not violate the due process clause even though it be erroneous in fact or law, or both.

State of Kansas, ex rel. Beck v. Occidental Life Ins. Co., 95 F.2d 935, 937 (10th Cir. 1938); *Hagar v. Reclamation Dist. No. 108*, 111 U.S. 701 (1884); *Holden v. Hardy*, 169 U.S. 366 (1898); *Endicott Johnson Corp. v. Encyclopedia Press*, 266 U.S. 285 (1924); *Dohany v. Rogers*, 281 U.S. 362 (1930); *Powell v. Alabama*, 287 U.S. 45 (1932); *George Moore Ice Cream Co. v. Rose*, 289 U.S. 373 (1933); *Owens v. Battenfield*, 33 F.2d 753 (8th Cir. 1929); *Cf. Burks v. Wisconsin Dept. of Transp.*, 464 F.3d 744, 759 (2006) (" . . . we have previously rejected arguments that summary judgment violates either the Fifth or Seventh Amendments.").

In the present case, Petitioner does not assert the Panel violated any of these due process requirements applicable to judicial proceedings. Specifically, Petitioner does not allege (1) the Panel violated any Federal Rules of Appellate Procedure, (2) the Panel was without jurisdiction to decide the appeal, (3) Petitioner was without notice of the appeal, and (4) Petitioner was not given an opportunity to raise every argument he had in opposition to the appeal.

Rather, Petitioner actually (1) filed a brief in opposition to the issues raised by Respondent on

appeal, (2) filed a brief in support of his cross-appeal, (3) filed a reply brief regarding his cross-appeal, (4) appeared for oral argument before the Panel and (5) requested a rehearing *en banc* before the Tenth Circuit. In other words, "[t]he proceeding involved here was in due form; the court had jurisdiction of the subject matter; and the [Petitioner] had notice and [was] heard", which satisfied the full measure of the exactions of due process. *Id.*

Petitioner argues the Panel simply reached the wrong decision in issuing its opinion. Petitioner's assertion is incorrect for the reasons stated below; however, even if it is assumed for the sake of argument that the Panel's decision in this case was wrong, a ruling that is "erroneous in fact or law, or both" does not violate the due process requirements of the Fifth Amendment where the above stated criteria are met. *Id.* at 937. There is no dispute that the due process requirements required by the Fifth Amendment were met with respect to the appeal decided by the Panel. Therefore, Petitioner's argument that the Panel's decision violated the due process requirements of the Fifth Amendment fails to find support in fact or law. Accordingly, this Court should deny Petitioner's Petition for Writ of Certiorari.

The Tenth Circuit Complied with 28 U.S.C.A. § 1652 in Issuing Its Decision.

Petitioner makes the erroneous assertion that the Panel "disregarded its statutory obligation under 28 U.S.C.A. § 1652 to apply . . ." the law of Kansas. However, quite the opposite is true. The Panel correctly stated and applied Kansas law regarding

wanton conduct as stated by the Supreme Court of Kansas.

In support of this invalid assertion, Petitioner primarily argues that the Panel did not consider the Tenth Circuit's decision in *Wolfgang*. This assertion is untenable, because Judge Kelly, a member of the Panel, sat on the panel of judges that decided *Wolfgang* and Judge Kelly authored the *Wolfgang* decision. *Wolfgang v. Mid-American Motorsports, Inc.*, 111 F.3d 1515 (10th Cir. 1997). Furthermore, the Panel cited *Wolfgang* in its decision in the present case. *Wagner v. Live Nation Motor Sports, Inc.*, 586 F.3d 1237, 1242 and 1246 (2009). Furthermore, *Wolfgang* was decided by the Tenth Circuit, not an appellate court of Kansas and, therefore, *Wolfgang* is not binding precedent on the Tenth Circuit. *Gasperini v. Center for Humanities, Inc.*, 518 U.S. 415, 427 (1996) ("Under the *Erie* doctrine, federal courts sitting in diversity apply state substantive law and federal procedural law.") As a result, even if the Panel did not consider *Wolfgang*, which it did, this alleged omission does not constitute reversible error.

Further, the Panel accurately stated Kansas law regarding wanton conduct as pronounced by the Supreme Court of Kansas in *Bowman*, *Robison*, *Friesen*, *Reeves*, *Gould*, and *Lanning*. *Wagner*, 586 F.3d at 1244-1246; *Bowman v. Doherty*, 686 P.2d 112 (Kan. 1984); *Robison v. State*, 43 P.3d 821 (Kan. Ct. App. 2002); *Friesen v. Chicago, Rock Island & Pac. R.R.*, 524 P.2d 1141 (Kan. 1974); *Gould v. Taco Bell*, 722 P.2d 511 (Kan. 1986); *Reeves v. Carlson*, 969 P.2d 252 (Kan. 1998); *Lanning ex rel Lanning v. Anderson*, 921 P.2d 813 (Kan. Ct. App. 1996). That is, under Kansas law "a plaintiff must make a two-pronged

showing: (1) that the act was 'performed with a realization of the imminence of danger'; and (2) that the act was performed with a 'reckless disregard [of] or complete indifference to the probable consequences of the act." *Wagner*, 586 F.3d at 1244 *quoting Reeves v. Carlson*, 969 P.2d 252, 256 (Kan. 1998).

Moreover, the Panel correctly stated the rule enunciated by the Supreme Court of Kansas in *Friesen* in the context of this case as follows: "'a token effort' to prevent the harmful consequences of staging a motorcycle race 'would not avoid liability' for wanton conduct, but 'definite acts which materially lessen the chances of' such consequences *would* avoid liability." *Wagner*, 586 F.3d at 1247 quoting *Friesen*, 524 P.2d at 1148. (emphasis original).

Further, Petitioner complains about the Panel's analysis of the alleged wanton conduct. The Panel found that the courts of Kansas had analyzed allegations of wanton conduct in both a specific and general manner and, therefore, the Panel analyzed the allegations of wanton conduct in a specific and general manner to the benefit of Petitioner. *Wagner*, 586 F.3d at 1245. The Panel applied the aforementioned two-part inquiry to the risks associated with the seven allegations of wanton conduct specified by Petitioner and to the broad risk associated with staging a motorcycle race. *Wagner*, 586 F.3d at 1246-1248. In the end, the Panel properly found no matter how it viewed the risks associated with the motorcycle race, specific or broad, there simply was no evidentiary basis for a finding of wanton conduct especially in light of the many safety precautions taken by Respondent. *Id.*

Interestingly, Petitioner does not specifically discuss any of the Supreme Court of Kansas' cases on which the Panel relied in reaching its unanimous decision in the present case. Further, Petitioner accuses the Panel of "invent[ing] a new principle of law that had never been contemplated by Kansas courts and then appl[ying] that newly discovered principle in an arbitrary and irrational manner . . ." (Petitioner's Brief, at 7).

Petitioner's assertion is fatally flawed because when the Panel set forth the law regarding wanton conduct the Panel quoted directly from the decisions of the Supreme Court of Kansas. It would seem impossible to invent a principle of law while at the same time quoting from binding Kansas precedent. Perhaps Petitioner's decision not to discuss the binding precedent on which the Panel relies is based on the fact that he cannot put into words how the binding precedent cited by the Panel allegedly invents a new standard never contemplated by the appellate courts of Kansas and how the Panel irrationally applied the same without making such naked and unsupported accusations. In any event, Petitioner's assertion that the Panel disregarded its statutory obligation under 28 U.S.C.A. § 1652 to apply the law of Kansas is without merit.

Finally, while the Panel found that Petitioner met the first prong necessary to establish wanton conduct, the Panel properly applied "the *Friesen* rule regarding preventative measures . . ." to ". . . easily conclude that Wagner failed to put on evidence based upon which a reasonable jury could have found that SFX acted wantonly rather than merely negligently." *Wagner*, 586 F.3d at 1247. In other words, the Panel

appropriately found Petitioner failed to meet the second prong necessary to establish wanton conduct i.e. ". . . that the act was performed with a 'reckless disregard [of] or complete indifference to the probable consequences of the act.'" *Wagner*, 586 F.3d at 1247 quoting *Reeves*, 969 P.2d at 256.

As a result, the Panel was correct in its holding that there was not a legally sufficient evidentiary basis in the record to support a claim of wanton conduct under Kansas law. Accordingly, the question presented by Petitioner under 28 U.S.C.A. § 1652 fails to establish a reason for this Court to grant Petitioner's Petition for Writ of Certiorari.

The Panel's Decision does not Violate the Seventh Amendment.

At first blush, Petitioner's argument that the Panel's decision in this matter violated his Seventh Amendment right to a jury trial appears to have the potential to hold water. However, once the argument is explored past the surface, one quickly realizes the dam has given way.

It is difficult to determine exactly what Petitioner's argument is with respect to the Seventh Amendment. At times, it appears Petitioner is arguing that a directed verdict under any circumstances violates the right to a jury trial under the Seventh Amendment. This Court has heard this argument before and dismissed it as follows:

> If the intention is to claim generally that the Amendment deprives the federal courts of power to direct a verdict for insufficiency of

> evidence, the short answer is the contention has been foreclosed by repeated decisions made here consistently for nearly a century. [Citations omitted]. More recently the practice has been approved explicitly in the promulgation of the Federal Rules of Civil Procedure. Cf. Rule 50; Berry v. United States, 312 U.S. 450, 61 S.Ct. 637, 85 L.Ed. 945. The objection therefore comes too late.

Galloway v. U.S., 319 U.S. 372 (1943).

Further, Petitioner does not state the applicable standard of review regarding the district court's review of a denial of Respondent's motion for directed verdict, nor does Petitioner take the position the Panel failed to state the correct standard of review. Petitioner's silence on the Panel's statement of the standard of review speaks volumes.

Not only did the Panel accurately state the applicable standard of review, the Panel properly applied and adhered to the same during the development of their rationale and through the statement of their ultimate conclusion. Therefore, Petitioner's complaint under the Seventh Amendment is nothing short of a fallacy. Petitioner cannot avoid the fact that, "nothing in the Seventh Amendment removes the appellate court's duty to correct errors of law . . . ," which is exactly what the Panel found and corrected in the present case. *Ballwanz v. Isthmian Lines, Inc.*, 319 F.2d 457 (4th Cir. 1963) *citing Atlantic & Gulf Stevedores, Inc. v. Ellerman Lines*, 369 U.S. 355, 366 (1962) (dissenting on other grounds).

The Panel stated the applicable standard of review as follows:

> A party is entitled to JMOL only if the court concludes that "all of the evidence in the record . . . [reveals] no legally sufficient evidentiary basis for a claim under the controlling law." (citations omitted). Drawing all reasonable inferences in favor of the nonmoving party, which in this case is Wagner, we thus will reverse the district court's denial of the motion for JMOL "if the evidence points but one way and is susceptible to no reasonable inferences supporting the party opposing the motion" (citation omitted). It is not our province to "weigh evidence, judge witness credibility, or challenge the factual conclusions of the jury." (citation omitted).

Certainly, Petitioner cannot argue that the Panel failed to state the correct standard of review. However, Petitioner makes an attempt to argue the Panel disregarded the standard of review. This endeavor fails because the Panel strictly followed the standard of review and Petitioner's arguments are based on mere conclusory statements and unsupported assertions.

Petitioner argues the Panel ignored evidence upon which the district court relied in denying Respondent's motions for directed verdict. However, this statement is simply incorrect. The Panel expressly discussed the evidence upon which the district court relied in denying Respondent's motions and explained in detail the legal basis for its conclusion that the district court committed error. *Wagner*, 586 F.3d at 1246-1248. The

Panel expressly stated in its written opinion that, it considered all of the evidence in the record. *Wagner*, 586 F.3d at 1248. Further, the Panel acknowledged that the jury was "within its rights to believe little, or indeed, none of the sworn testimony" favorable to Respondent. *Wagner*, 586 F.3d at 1246; *quoting Wagner v. SFX Motor Sports Inc.*, 522 F. Supp. 2d 1330, 1339 (D. Kan 2007); *see Reeves v. Sanderson Plumbing Prods*, 530 U.S. 133, 151 (2000).

The Panel found that the evidentiary record did not provide a legally sufficient evidentiary basis to find that Respondent realized the imminent danger alleged by Petitioner, regardless of whether it was viewed narrowly or broadly, and, therefore, the Panel need not look further to see if Respondent was completely indifferent to the alleged imminent danger. However, the Panel did look further and determined the safety precautions that Respondent took to materially lessen the chances of harmful consequences arising from Respondent staging the motorcycle race allowed the Panel to easily conclude "that Wagner failed to put on evidence based upon which a reasonable jury could have found that SFX acted wantonly rather than merely negligently." *Wagner*, 586 F.3d at 1247.

Specifically with respect to the alleged realization of danger regarding Corner 10, the Panel stated that,

> ". . . while the jury was free to disregard or doubt the credibility of SFX's employees and former employees who testified that they were aware of no previous crashes at Corner 10 and that they had no reason to believe that the concrete wall in question would be an impact area, the jury was not free to infer SFX's

> knowledge of damage from an absence of evidence on the issue."

Wagner, 586 F.3d at 1247-1248 (emphasis original). The Panel's review of the entire record lead them to find that, "Wagner offered no evidence that SFX knew or should have known of the danger posed by the configuration of Corner 10." *Wagner*, 586 F.3d at 1248. Further, the Panel found that even if Wagner had put on such evidence the safety precautions taken by SFX established that SFX was not completely indifferent to that danger.

Petitioner's assertions that the Panel disregarded evidence and misapplied Kansas law are simply wrong. Therefore, Petitioner's issue regarding the alleged violation of his Seventh Amendment right to a jury trial fail to provide a reason for this Court to grant Petitioner's Petition for Writ of Certiorari.

MISREPRESENTATIONS MADE BY PETITIONER

Petitioner shamelessly makes numerous misrepresentations regarding the facts of this case and the holdings of this Court and the Supreme Court of the State of Kansas, as well as with respect to the Tenth Circuit's ruling in the present case. Respondent identifies these misrepresentations for the Court pursuant to Supreme Court Rule 15.2.

Many of Petitioner's representations of the case law he cites are analogous to an attempt to put a square peg in a round hole. The representations do not match up with the actual holdings of the cases.

For instance, Petitioner cites *Hollingsworth* for the rule that, "Circuit Courts of Appeal are not free to ignore their own rules." *Hollingsworth v. Perry*, _____ U.S. _____, 130 S.Ct. 705 (2010). *Hollingsworth* has no bearing on the present case, because the case at hand does not involve the Tenth Circuit's amendment of a federal procedure or local rule mandated by federal law, nor did the Panel take any action that resembles the act of the court in *Hollingsworth*.

It appears Petitioner is asserting the rule the Panel ignored was the decision in *Wolfgang*. Even if the Tenth Circuit Panel at issue did not consider the *Wolfgang* decision, *Wolfgang* is not binding Kansas precedent and, therefore, perhaps Petitioner forgot the Panel was free to not consider *Wolfgang*. *Gasperini*, 518 U.S. at 427. The parties stipulated in the Pretrial Order that Kansas substantive law governed this case and, therefore, the Panel was only required to consider and apply the relevant case law published by the appellate courts of Kansas.

Further, Petitioner cites *Hayes Sight & Sound, Inc.* with respect to the definition of "wanton conduct;" though that case does not provide a definition of "wanton conduct," let alone the definition asserted by Petitioner. *Hayes Sight & Sound, Inc. v. ONEOK, Inc.*, 136 P.3d 428 (Kan. 2006). Petitioner also cites *Cerretti* regarding "wanton conduct." *Cerretti v. Flint Hills Rural Elec. Coop. Ass'n*, 251 Kan. 347, 366, 837 P.2d 330 (1992). While *Cerretti* at least contains a definition of "wanton conduct," it does not provide the definition stated by Petitioner. *Id.*

In addition, *Hawkinson* does not state "Kansas law permits a finding of wanton conduct with respect to

one wrongful act even though other wrongful acts of the defendant might fall short of wanton conduct" as Petitioner represents to this Court. *Hawkinson v. Bennett*, 962 P.2d 445 (Kan. 1998). Rather, *Hawkinson* holds that a jury may find wanton conduct under one legal theory, i.e. breach of fiduciary duty, and not another legal theory i.e. tortious interference. The applicable rule regarding Respondent's argument to the Tenth Circuit, which the Panel did not reach, is an appellate court "must reverse if" a district court erroneously submits one of two or more issues to the jury and "'it cannot be determined whether the jury relied on the improper ground'." *Brown v. Wal-Mart Stores, Inc.*, 11 F.3d 1559, 1566-1567 (10th Cir. 1993), citing *Farrell v. Klein Tools, Inc.*, 866 F.2d 1294, 1299 (10th Cir. 1989).

Further, Petitioner misconstrues the holding in *Resolution Trust Corporation* for the proposition that "[u]nder Kansas law a tort plaintiff has a vested property right in existing rules of law that cannot lawfully be impaired through modification of rules of law without affording due process." *Resolution Trust Corporation v. Fleischer*, 257 Kan. 360, 892 P.2d 497 (1995). In *Resolution Trust Corporation*, the Supreme Court of Kansas addressed "whether the legislature [could] retroactively change a common-law duty of care, thereby eliminating an accrued and pending tort cause of action." *Id.* at 366-367. The *Resolution Trust Company* case defines "accrual of a cause of action" as "the right to institute and maintain an action for enforcement." *Id.* at 367.

Resolution Trust Company is not applicable to the present case. First, the Court clearly states, "[o]ur answers to the certified questions are based on and

limited to the facts and circumstances in the instant case." *Id.* at 366. Further, the Panel is clearly not a legislative body and they did not enunciate a new common-law duty and apply it retroactively, thereby eliminating Petitioner's ability to assert his cause of action against Respondent.

Further, *Marshall* involves the duty owed to a patron of exhibitors, not the duty owed to a participant in the exhibition itself, as Petitioner represents to this Court. *Marshall v. Heartland Park Topeka*, 274 Kan. 294, 298-299, 49 P.3d 501 (2002).

Petitioner also makes numerous misrepresentations regarding the facts of the case and the events that have taken place to date in this matter. For instance, Petitioner would have this Court believe that Petitioner and Respondent agreed "in their district court briefs and their appellate briefs," *Wolfgang* was the "most relevant precedent" and the trial judge was of the same opinion. Petitioner's representations are simply false.

Respondent distinguished *Wolfgang* on the facts and with respect to the issue of comparative fault. For example, at the hearing on the parties motions *in limine* counsel for Respondent stated,

> No, I don't think there are any cases on point. We radically disagree that *Wolfgang* is on all fours because the real difference in *Wolfgang* is the Plaintiff in *Wolfgang* admitted he was negligent and they did not claim anything that was a result of his negligent acts on. The claims were only for the failure to extricate him from the vehicle in *Wolfgang*. That is why I [said]

> *Wolfgang* [is] totally distinguishable from this case.

(Aplt. App., V. 5, p. 1325). In light of this statement and others by Respondent, it is impossible to understand how Petitioner believes Respondent agreed *Wolfgang* was the most relevant case or controlling precedent.

Further, the trial judge told counsel for Petitioner during the same hearing,

> And specifically my concern is that even as you propose to limit your claim, it would not come within the realm of what the *Wolfgang* claimant had done and that is going to be deemed as a matter of law materially distinguishable for purposes of appeal.

(Aplt. App., V. 2, p. 1316). Moreover, the trial judge's order on the parties' motions *in limine* distinguished the *Wolfgang* case from the present case. (Aplt. App., V. 4). For instance, the order stated, ". . . the court is inclined to find *Wolfgang* factually distinguishable, or at a minimum that Plaintiff reads the case too broadly." (Aplt. App., V. 4, pp. 969). Clearly, the trial court did not recognize *Wolfgang* as all controlling precedent. No where in the district court's memorandum order on Respondent's post-trial motions does the district court proclaim *Wolfgang* was the most relevant case or controlling precedent. (Aplt. App., V. 4, pp. 1234-1261).

While Petitioner clearly believed and argued the relevance of *Wolfgang*, Respondent argued in its briefs to the district court pre- and post-trial, at oral

argument before the district court, and in its briefs to the Tenth Circuit and at oral argument that *Wolfgang* was not controlling precedent. Petitioner simply misrepresents Respondent's and the district court's positions with respect to the *Wolfgang* case.

Moreover, Respondent distinguished *Wolfgang* based on the facts. Respondent argued as follows in its Motion for Summary Judgment and continued to assert these factual distinctions through oral argument to the Tenth Circuit.

> The race in *Wolfgang* involved sprint cars that have a unique design and have an increased risk of fire due to the use of methanol fuel, which is highly flammable. (*Wolfgang*, 898 F.Supp. at 785, 791). The plaintiff (in *Wolfgang*) alleged that the firefighters were not properly trained and equipped with respect to accidents involving specially designed sprint cars and extrication of racers from the same and, as a result, plaintiff remained in his burning car for eight (8) to ten (10) minutes. *Id.* at 791; *Wolfgang v. Mid-America Motorsports, Inc.*, 111 F.3d 1515 (10th Cir. Kan. 1997). Specifically, the plaintiff alleged that the defendants' lack of knowledge regarding the "release mechanism present on the steering wheel and a fuel line that ran through the cockpit" constituted wanton conduct. *Id.* at 791. In the present case, those issues simply do not exist. The increased risk of fire because of the use of methanol was nonexistent in the motorcycle race at issue. Further, the accident in this case involved a motorcycle and, therefore, there was no need for the firefighters

> to be trained with respect to a specially designed vehicle or extrication procedures regarding the same. Moreover, the corner workers that responded to Mr. Wagner's accident were properly trained and equipped to aid Mr. Wagner. In addition, the plaintiff in *Wolfgang* alleged that the defendants did not have a sufficient number of firefighters at the practice session for the sprint car race. *Id.* at 791.
>
> In this case, it is uncontroverted that at the time of the accident the corner stations closest to where Mr. Wagner's accident occurred were staffed, and there were two (2) ambulances and a fire suppression truck on the premises. (SUF Nos. 46 and 47). Further, the relevant Defendants believed that they had a sufficient number of corner workers and that they were adequately trained to execute their duties.

(Aplt. App., V. 1, pp. 38-39).

Furthermore, at oral argument before the Tenth Circuit, Respondent argued that the present case was not *Wolfgang*, and explained the factual distinctions between the two cases. Further, the evidence presented in this case was not more one-sided than the evidence presented in *Wolfgang* as Petitioner asserts for the reasons set forth above. In fact, in *Wolfgang* there was at least an argument that evidence of wanton conduct existed whereas in this case there was none.

Petitioner goes so far as to say the Panel did not "explain why [*Wolfgang*] was not controlling precedent

. . ." (Pet. Brief, at 8). It would appear to Respondent that the Panel did not need to state that *Wolfgang* was not controlling precedent because it is black letter law in a diversity case where state law applies the only decisions that constitute controlling precedent are those opinions published by the state's appellate courts, which constitute the substantive law of the state. *Gasperini*, 518 U.S. at 427. Certainly, Petitioner is not taking the position that the appellate courts of Kansas have not published opinions regarding wanton conduct in light of the case law cited in the Panel's decision.

The Panel did not reach the arguments raised in Petitioner's cross-appeal; however, that did not stop Petitioner from arguing in his Petition to this Court that the district court's application of the noneconomic damage cap pursuant to Kansas law was a remittitur. Petitioner's argument with respect to remittitur finds no support in fact, law or reality and is absolutely frivolous.

Further, Petitioner's assertion that the racetrack workers made no attempt to douse the flames that consumed his clothing is incorrect. The evidence at trial established that the corner workers responded to the accident very quickly and attempted to put out the fire on and around Petitioner and his motorcycle.

In addition, Petitioner misrepresents the stipulation Respondent entered into prior to trial regarding the wall outside of Corner 10. The written stipulation actually stated as follows:

1. Heartland Park Raceway, LLC had control over the barrier outside of Turn 10 with which Plaintiff allegedly collided.

2. The barrier outside of Turn 10 with which Plaintiff allegedly collided could be moved with the proper equipment.

(Aplt. App., V. 3, p. 797).

Further, Plaintiff represents to this Court that the jury found specific acts of wanton conduct. The jury was not presented with special interrogatories and, therefore, the jury did not make any specific findings regarding wanton conduct.

Finally, it appears that Petitioner is taking the position that Heartland Park Raceway, LLC was a party to the appeal to the Tenth Circuit and a party to Petitioner's Writ of Certiorari to this Court. Heartland Park Raceway, LLC did not appeal the judgment or any issue decided at the district court level and, therefore, Heartland Park Raceway, LLC has not been a party to this case since the U.S. District Court of Kansas entered judgment in favor of it shortly after the jury rendered its verdict.

CONCLUSION

Put simply, the Petition for Writ of Certiorari does not present this Court with a legal issue that has any merit. The Panel properly reversed the district court's denial of Respondent's Rule 50(b) motion, vacated the jury's verdict in favor of Petitioner, and remanded to the district court with instructions to enter judgment as a matter of law in favor of Respondent. For all the

reasons set forth above, this Court should deny Petitioner's Petition for Writ of Certiorari.

Respectfully Submitted,

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